### ii. Excess capacity and ease of expansion.

Developer plans to build additional fiber transport capacity within the State of Minnesota. Developer currently has 0% of the current fiber capacity and 0% of the traffic. The fiber facilities will be utilized to transport intrastate and interstate traffic. As shown above, existing providers are still permitted to offer telecommunications service with no new cost or regulatory burden imposed on operating these existing facilities. Existing fiber facilities already provide 100% of the market share and there is sufficient unlit fiber capacity within the State to increase traffic dramatically without constructing additional infrastructure. According to the FCC's statistics, only 60,206 km of the state's 403,964 km of fiber, or roughly 15% of the deployed fiber, is lit (i.e., equipped to transmit digital signals).[17] *FCC Statistics of Common Carriers, supra.* See Exhibit 8.

Even if existing providers reach capacity constraints, they may typically increase the traffic-carrying capacity or bandwidth of fiber by upgrading the electronics on their existing system at a much lower cost than installing new fiber strand capacity. Recent technological advances in electronics used to light fiber have greatly increased the bandwidth or capacity of already existing fiber. For example, since 1992, multiple OC-192 digital units can significantly expand the carrying capacity of existing fiber using OC-48 technology and typically can be installed more economically than installation of additional fiber strands. Exhibit 8, Affidavit of Bhimani.

Because the amount of spare capacity is so significant, and because the opportunity and potential to expand existing capacity are so great, existing providers do not face capacity constraints on their networks. New entrants wishing to offer telecommunications service will be able to purchase or lease transport capacity from existing providers as well as from Developer at

---

[17] This is further supported by statements made by MTA representatives in meetings with the Commissioner of Administration where they indicated that there is already sufficient fiber capacity available to handle the State of Minnesota's telecommunications needs and that additional capacity was simply not necessary. Exhibit 8, Affidavit of Bhimani.

competitive market-based prices.[18] Here, where the competitive market for transport is not materially restricted such that no provider is effectively prohibited from obtaining transport facilities over which telecommunications services can be provided, Section 253(a) is simply not implicated.

**iii. Existing alternative rights-of-way.**

Any new entity wishing to construct fiber transport capacity is still free to do so. Indeed, entities are currently in the process of doing just that. New entrants are looking to expand fiber capacity in both the IXC market and the local market. For example, MCImetro is currently offering local service using its own facilities, including a fiber ring installed on rights-of-way purchased from Western Union, and its own switching facility. Brooks Fiber is currently constructing a fiber ring in the Twin Cities Metropolitan area. OCI Telecommunications, Inc. has installed a switch and is in the process of developing its own fiber ring in the Twin Cities Metropolitan area. The IXC transport market is equally healthy. Cooperative Power Company and Brooks Fiber have plans to construct interexchange fiber transport networks. Exhibit 8, Affidavit of Bhimani.

Alternative rights-of-way along railroads, gas pipelines, oil pipelines and electric power lines, as well as state and county roads, provide thousands of miles of rights-of-way for construction within the State. Exhibits 12 to 17 show alternative rights-of-way compared to the freeway rights-of-way, for which exclusivity would be granted. Developer will utilize non-freeway State Trunk Highway rights-of-way for which no exclusivity has been granted to Developer to construct nearly half of the transport miles contemplated under the Agreement.

---

[18] A look at the Minnesota telecommunications service market further demonstrates the vitality of competition in the State. There are approximately 250 certified interexchange carriers offering services in the State. In addition, roughly 40 carriers have applied for or received authority to provide local service in Minnesota under the Telecom Act (information obtained from the Minnesota Department of Public Service). These providers must all construct or lease transport facilities and the current expanding market for transport is meeting this demand.

These same non-freeway State Trunk Highway, along with municipal rights-of-way, are also available to new entrants, at locations where Developer will place fiber on a non-exclusive basis and at routes generally following the freeway throughout the State. Exhibit 6, Affidavit of Lari. Accordingly the grant of exclusive access to the Developer for the freeway rights-of-way will not have the effect of prohibiting new entrants from acquiring rights-of-way sufficient to effectively compete in offering interstate and intrastate telecommunications services.

The alternative rights-of-way in this matter are more significant than those available in *Huntington Park.* There, the challenged municipal ordinance removed private outdoor locations for payphone providers in the Central Business District. The ordinance restricted placement of payphones to indoor private property in a manner so as to potentially reduce their economic value. Finally, although it did not grant Pacific Bell an exclusive contract for public outdoor rights-of-way, the city did not utilize a competitive procurement procedure and the contract with Pacific Bell assured it of a stronghold on the already encroached rights-of-way (Pacific Bell must retain at least 80 percent of its payphone locations). Despite these facts, the Commissiion did not pre-empt this ordinance because the record showed no material impact on competition.

In the instant case, the State is not imposing limitations on the use of private rights-of-way; nor are alternative public rights-of-way restricted through the grant of exclusive access on freeways. Although in *Huntington Park* the Commission found that the contract with Pacific Bell was facially non-exclusive, the practical effect of the contract was to create significant barriers. *See Huntington Park, separate statement of Commissioner Ness.* Here the Agreement between the State and Developer imposes significant burdens on Developer which have the practical effect of making the Agreement functionally non-exclusive. Because the Developer must install collocated fiber of third parties and lease or sell network capacity to telecommunications carriers on a non-discriminatory basis, the practical impact of the Agreement is to enhance, not restrain, competition.

Finally, as stated at the outset, the Agreement differs materially from the circumstances in *Huntington Park* and *TCI Cablevision.* In the instant case no new burdens have been imposed on

the use of these alternative rights-of-way. No new restrictions have been imposed on existing facilities. Thus, the State action involved has expanded rather than restricted the ability of entities to offer telecommunications service. The grant to a single wholesale transport carrier of previously unavailable rights-of-way will serve to stimulate fiber investment on a statewide basis by adding another facilities-based entrant to the market. The project increases statewide capacity and offers telecommunications service providers another alternative for routing traffic, particularly in more rural areas of the State. Such competition enhancing telecommunications investment is not proscribed by Section 253(a).

**b. The contract covenant to provide for installation, purchase or lease of capacity on a non-discriminatory basis insures against any potential effective prohibition.**

The wholesale fiber network to be developed in the MnDOT rights-of-way is not the only fiber transport capacity which exists, or which can be constructed in the State, to meet the needs of those who wish to offer telecommunications services in Minnesota. Nonetheless, Developer and the State have agreed to certain contractual provisions which assure that the ability of an entity to offer telecommunications service is not unnecessarily restricted.

Through the exercise of its contracting authority, the State has limited the discretion of the Developer to materially inhibit providers of telecommunication services from offering services by requiring that it make non-network capacity and Developer's network capacity available on a non-discriminatory basis. Thus, to the extent any contractual conditions exist which affect the use of the fiber facilities, those conditions are intended to support and enhance federal policy to open telecommunications markets.[19]

---

[19] This case does not raise any of the concerns expressed in *TCI Cablevision.* There, a municipal ordinance that supposedly exercised Troy's rights-of-way authority required that franchises interconnect with other telecommunications systems in the City and provided for regulation of the fees charged for interconnection and mandated "most favored nation" treatment for the City under a franchise providing a new service, facility or equipment in another municipality. Although the Commission concluded that preemption pursuant to Section 253(d) was not warranted based upon the factual record, the Commission noted:

First, under the Agreement, the Developer must sell or lease transport capacity to all similarly situated customers in a non-discriminatory fashion. Exhibit 5, Sections 7.7 and 7.8. Pursuant to the Agreement, Developer will construct a fiber transport network in the State. It can either sell or lease unlit network capacity (i.e. dark fiber) or lit network capacity. Second, Developer must install non-network capacity on behalf of any other entity, and it must do so on a non-discriminatory basis.[20] The ability of service providers to have their own collocated fiber installed and to purchase unlit network capacity is similar to the bulk capacity made available on an indefeasible right of user (IRU) basis. See *In the Matter of AT&T Submarine Systems, Inc., supra.*

Thus, telecommunications service providers, rather than being prohibited from offering services to the public, will be able to obtain transport capacity from Developer at non-discriminatory, market-based rates. The increased capacity from the lit fiber network may by itself serve to drive down the costs for service providers choosing to lease facilities by stimulating further competition among transport providers. In addition, the ability of providers to purchase unlit capacity or install non-network capacity will serve to foster competitive pressures in the fiber transport market by expanding opportunities for fiber placement. Because the Developer must undertake to serve all carriers on a non-discriminatory basis, the restriction on physical access to the rights-of-way does not cause any similar restriction or prohibition on an entity's ability to offer telecommunications services. Rather, it enhances that ability.

### C. Congress Explicitly Preserved The Long-Standing Authority of State And Local Governments To Protect The Public Safety.

Even if the Commission finds that Section 253(a) is implicated by the Agreement, it should not pre-empt the State requirement if it is saved by Section 253(b). Congress took no action in the Telecom Act to disturb the police power rights of the states to protect public safety.

---

[20] As previously noted, installation of non-network capacity must occur at the same time as installation of network capacity to avoid unnecessary intrusion on freeway rights-of way.

Section 253(b) expressly preserves the right of states to impose requirements to protect the public safety. Section 253(b) of the Act reads:

> ***Nothing*** in this section ***shall affect the ability of a state to impose,*** on a competitively neutral basis and consistent with section 254, ***requirements necessary to*** preserve and advance universal service, ***protect the public safety and welfare,*** ensure the continued quality of telecommunications services, and safeguard the rights of consumers. (Emphasis added.)

Accordingly, MnDOT has the continuing right, undisturbed by the Telecom Act, to limit and control the number of persons who can gain access to freeway rights-of-way for longitudinal installation and operation of fiber optic cable as long as it does so on a competitively neutral basis. Until now, Minnesota has elected, with one minor exception, to prohibit longitudinal encroachments in freeway rights-of-way. The Agreement creates an exception to this long-standing policy, permitting a one-time longitudinal installation of fiber optic cable, to be installed and maintained by a single contracting entity for access to State freeway rights-of-way. For the reasons discussed herein, MnDOT has determined that protection of public safety requires exclusive longitudinal access with a single point of control and contact. Exhibit 6, Affidavit of Lari. Section 253(b) expressly recognizes and preserves MnDOT's authority to make this decision.

In examining whether a state requirement is saved by Section 253(b), the Commission has sought to determine: (1) whether the requirement was necessary to fulfill the enumerated public interest objectives of Section 253(b); and (2) whether the requirement is competitively neutral. The Commission has indicated that its "goal in interpreting the term 'necessary' in this specific context is to foster the overall pro-competitive, deregulatory framework that Congress sought to establish through the 1996 Act and the directive in Section 253 to remove barriers to entry." *New England, supra at para. 25.*

Protection of the traveling public and transportation workers is clearly the type of public safety issue which is covered by Section 253(b). Unlike certain types of economic entry regulation, requirements which clearly are aimed at protecting public safety should be reviewed

based on whether the regulation or requirement is reasonable, not whether it is the least restrictive alternative available. Recently the Commission preempted economic entry regulation of new telecommunications entrants which required a specific sub-class of providers to build-out facilities as a condition of entering the local service market. The Commission found that the build-out requirement was not necessary to protect any of the public interest criteria of Section 253(b). *Public Utility Commission of Texas, et al., Petition for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995* CCB Pol. 96-13, 16 and 19, Memorandum Opinion and Order, FCC 97-346 (rel. October 1, 1997) (Public Utility Commission of Texas).

Traditional exercise of the State's police power to protect public safety by restricting the number of entrants in freeway rights-of-way does not impose economic entry regulation which could hinder the pro-competitive federal policy. The purpose for granting a right of exclusive access is to protect the safety of the traveling public and transportation workers. The Commission has explicitly recognized that state and local authorities may ensure public safety in the use of rights-of-way by "gas, telephone, electric, cable and similar companies." *In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems,* CS Docket No. 96-46, Second Report and Order, 61 FCC rec. 28698 (615196), (Open Video Systems), FCC 96-249 (rel. June 3, 1996) paras. 207-222.

Thus, the only remaining question under Section 253(b) analysis is whether the requirement is competitively neutral. In *Open Video Systems*, Third Report and Order and Second Order on Reconsideration, FCC-96-334 (rel. August 8, 1996), the Commission found that the competitively neutral standard of Section 253(b) does not mean "equal treatment." *Id., para. 195.* Thus, when the State reasonably determined that it was necessary to protect public safety to allow only one entity in the freeway rights-of-way, it satisfied the competitive neutrality test by engaging in an open and fair Request for Proposals process and awarding the contract to the most advantageous proposer as further discussed in Section D below.

### D. The Grant Of Exclusive Access Is Necessitated By The State's Legitimate Interest In Managing These Unique Freeway Rights-Of-Way, Consistent With The Requirements Of Section 253(c).

As is the case with Section 253(b), even if a state law or requirement did raise concerns under Section 253(a), the Commission should interpret Section 253(c) such that the law or requirement is valid and enforceable if it is within the exception set forth in Section 253(c). Congress imposed no limitations on the right of state and local governments to ***manage*** their rights-of-way. The Telecom Act unambiguously and appropriately leaves the management of public rights-of-way in the hands of State and local government. The State of Minnesota, for example, has the right, consistent with the Telecom Act, to institute a blanket prohibition of rights-of-way access to telecommunications providers. Section 253(c) of the Act reads:

> ***Nothing*** in this section ***affects the authority of a State or local government to manage the public rights-of-way*** or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government. (Emphasis added.)

The legislative history of the Telecom Act supports the conclusion that the intent of Section 253(c) was to preserve the pre-existing authority of State and local governments to manage the public rights-of-way. House Report No. 104-204 on the 1996 Act, dated July 24, 1995, states, referring to Section 253(c), that it "makes explicit a local government's ***continuing authority*** to issue construction permits regulating how and when construction is conducted on roads and other public rights-of-way. ***This provision clarifies that local control over construction on public rights-of-way is not disturbed.***" (U.S. Code Congressional & Administrative News, March 1996, vol. 1, Legislative History section, at 41, emphasis added.)

Congress did, however, place conditions on the right of state and local governments to charge telecommunications providers for use of public rights-of-way. Section 253(c) provides:

> Nothing in this Section affects the authority of a State or local government to manage the public rights-of-way or to ***require fair and reasonable compensation from telecommunications***

> ***providers, on a competitively neutral, non-discriminatory basis***, for use of public rights-of-way on a non-discriminatory basis . . .

Thus, if the State elects, in the management of its public rights-of-way, to permit the use of such rights-of-way for telecommunications purposes, then Section 253(c) requires that (a) the compensation for such use be neutral and non-discriminatory, and (b) such use not discriminate between telecommunications providers.

Nothing in the Telecom Act prohibits state transportation departments from making the determination that certain rights-of-way have limited capacity for entry by telecommunication providers in the reasonable exercise of their authority to manage rights-of-way. Here, there is no doubt that the decision to allow only one provider access to freeway rights-of-way for longitudinal placement of fiber facilities is a reasonable exercise of the discretion vested in the Commissioner of Transportation. The history of prohibiting longitudinal use previously mandated and supported by the State, FHWA and AASHTO demonstrates the validity of the State's concern over the opening of these rights-of-way to physical access by more than one provider of telecommunications infrastructure. MnDOT determined that working with a single firm, a single point of control and contact to insure limited entry on these rights-of-way, in order to retain sufficient management capabilities over these rights-of-way, is necessary to protect public safety and convenience. Exhibit 6, Affidavit of Lari. This right-of-way management decision rests solely within the discretion of the state.

Section 253(c) requires that compensation for use of government rights-of-way be competitively neutral and non-discriminatory. The Agreement satisfies these criteria. First, the State utilized a public procurement process to select the entity to be granted access to the rights-of-way. The process was competitively neutral because notice of the Request for Proposals was published in the State Register and laid out the criteria for proposals, and the State awarded the right to negotiate the contract to the most advantageous proposer. "Competitively neutral" does not mean, "equal treatment" but rather that the state not unfairly favor one provider over another.

See *Open Video Systems, supra.* The State's open and fair procurement process assured that all entities were evaluated on the merits of their proposal.[21]

Here, the State's use of an RFP process provided the opportunity for entities to be treated fairly, in a competitively neutral and non-discriminatory manner. The open and fair RFP process used is similar to a Commission auction where limited spectrum capacity exists. All competitors are treated in a neutral and non-discriminatory manner and the highest bidder obtains the license for the use of the spectrum. There is nothing discriminatory about this practice. It simply allocates limited capacity fairly among competitors, while allowing for development of the resource.[22]

To further insure that the pro-competitive policies of the Act are fulfilled, the State has, through contractual agreement, assured that rates Developer charges for installation and maintenance of non-network capacity and purchase or lease of Developer's network capacity will be non-discriminatory. Exhibit 5, Section 7.7. The Agreement requires that this section apply equally to potential affiliates of Developer. Exhibit 5, Section 7.8. The ability of the State to add these rights-of-way to the available inventory of rights-of-way such that competition enhancing development of fiber optic transport facilities can occur is dependent on the State's ability to manage the freeway rights-of-way resource. Thus, the use of the freeway rights-of-way will occur on a nondiscriminatory basis. To read the non-discrimination clause as forcing the

---

21 As with the competitive neutrality and nondiscrimination requirements, the RFP process also produces fair and reasonable compensation for use of the freeway rights-of-way, where the State has found it necessary to limit physical access to the right-of-way.

22 In *Public Utility Commission of Texas*, at para.89, the Commission noted that an exclusive arrangement, which utilized a similar process for spectrum capacity, would raise serious concerns under the Act. However, that comment was made in the context of reviewing a state mandate requiring certain new entrants to build out local loop facilities within a limited time frame as an economic entry regulation and not after reviewing the particular facts of this case involving unique freeway rights-of-way, where physical access is limited to protect the very real concerns identified regarding public safety and convenience of the traveling public and transportation workers.

State to either allow complete access via a permit process or no access would defeat the pro-competitive policies of the Telecom Act by removing these rights-of-way from development.

Finally, to assure nondiscriminatory use pursuant to Section 253(c), Developer must concurrently install and maintain on a nondiscriminatory basis collocated fiber of telecommunications service providers. This duty, combined with the duty to sell or lease Developer's network capacity on a nondiscriminatory basis, grants all carriers substantial access to freeway rights-of-way for use in the manner that best suits their business needs, while limiting physical access in a manner that meets the State's legitimate exercise of its right-of-way management authority. If Section 253(c) were to be read to require longitudinal access to the freeway rights-of-way to anyone who wishes to enter the rights-of-way, the explicitly stated congressional purpose of preserving the State's right to manage its rights-of-way would be negated. The contractual obligation for Developer to install and maintain non-network capacity or to make available the fiber capacity, either through lease or purchase, on a non-discriminatory basis, offsets any conceivable concern arising from the Developer's exclusive access to the freeway rights-of-way.

The Agreement's contractual covenants act to satisfy any obligation of the State under Section 253(c) by mitigating any anti-competitive effects of the State's legitimate decision, protected under the Telecom Act, to manage its rights-of way by limiting physical access to one entity to assure safety and minimal disruption to the traveling public on these unique freeway rights of way.

## IV. CONCLUSION.

Based on the foregoing, the Minnesota Department of Transportation and the Minnesota Department of Administration respectfully request that the Federal Communications Commission issue a ruling declaring that the Agreement is consistent with the requirements of Sections 253(a), (b) and (c) of the Telecommunications Act of 1996.

Dated: December 30, 1997

Respectfully submitted,

HUBERT H. HUMPHREY III
Attorney General
State of Minnesota

Scott Wilensky

SCOTT WILENSKY
Assistant Attorney General

1200 NCL Tower
445 Minnesota Street
St. Paul, Minnesota 55101-2130
(612) 297-4609

DONALD J. MUETING
Assistant Attorney General

525 Park Street, Suite 200
St. Paul, Minnesota 55103
(612) 296-6639

AG:77029 v1

EXHIBIT
1

LAW OFFICES
MOSS & BARNETT
A PROFESSIONAL ASSOCIATION
4800 NORWEST CENTER
90 SOUTH SEVENTH STREET
MINNEAPOLIS, MINNESOTA 55402-4129
TELEPHONE (612) 347-0300
FACSIMILE (612) 339-6686
WRITER'S DIRECT DIAL NUMBER
347-0275

August 22, 1996

VIA FACSIMILE 297-1235

Mr. Donald Mueting
Assistant Attorney General
Office of the Attorney General
Suite 200
525 Park Street
St. Paul, MN 55103

Re: Construction of Telecommunications Network Within State Freeway Right-of-Way

Dear Mr. Mueting:

This letter is sent at the request of Jerry Knickerbocker at the Minnesota Telephone Association to address the question of whether the Minnesota Department of Transportation (MN/DOT) and the Minnesota Department of Administration (DOA) can proceed with the grant of an exclusive right to use freeway rights-of-way for installation of a statewide telecommunications network in light of the Telecommunications Act of 1996 (the "Act").

## SUMMARY

Based on the information available at this time, it appears that MN/DOT has issued a Request for Proposals and has selected a vendor for further negotiations with an intent to grant to that vendor an exclusive easement to install, within the freeway rights-of-way, a fiber optic transmission network that will be used to meet the state's telecommunications needs, and to provide "telecommunication service" to other telecommunications carriers and/or private end users. For the reasons set forth below, clearly the grant of an exclusive right to use the freeway right-of-way would violate Section 253 of the Act.

## DISCUSSION

On February 21, 1996, MN/DOT issued a Request for Proposals (the "RFP") to install a fiber optic and/or wireless transmission network within the state freeway rights-of-way through

MOSS & BARNETT
100

MOSS & BARNETT
A PROFESSIONAL ASSOCIATION



its public-private initiative program (TRANSMART). On August 14, 1996, a joint news release by MN/DOT and DOA announced the plan to begin negotiations with ICS/Stone & Webster based on a bid submitted in response to the RFP.

The RFP clearly indicates the intent to grant an exclusive right to use the freeway rights-of-way. The RFP reads in part:

> Objectives . . .
>
> > d) Provide the successful bidder exclusive rights to MN/DOT freeway right-of-way for commercial communication infrastructure purposes.
>
> 1. Overview . . .
>
> > Bidders must propose statewide access. Proposals for only one region or corridor in the state will not be considered. . . .
> >
> > MN/DOT wishes to barter exclusive rights to freeway right-of-way in exchange for capacity to satisfy immediate and future state needs.

(Emphasis added) At p.1. The RFP further states that:

> Freeway rights-of-way use for facilities has been restrictive in the past. MN/DOT is now permitting exclusive access to its right-of-way as the incentive to private industry.

(Emphasis added) At p.2. The RFP continues:

> [n]o other private use of fiber optic lines will be permitted on the freeways other than the system that now exists along I-94 between St. Cloud and Maple Grove" (At p.3) and that MN/DOT is "willing to consider" such an agreement for "up to 30 years" with a 20-year renewal "by mutual agreement. (At p.4.)

The MN/DOT-DOA joint news release makes it clear that state government use would present only a "small percentage" of the network's total available capacity, and that, "[t]he vast majority of the network's capacity would be available for private use." Clearly, the commercial advantage of an exclusive right to use the freeway rights-of-way was recognized and intended to induce favorable terms for the State, as reflected in the RFP.

MOSS & BARNETT
A Professional Association



While the grant of exclusive rights-of-way use in exchange for telecommunications capacity provides advantages to the State and to the holder of the exclusive rights, such an approach clearly violates the requirements of Section 253 of the Act. Section 253(a) reads:

> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

The prohibition of Section 253(a) is broadly phrased and is intended to have broad application. The exceptions to this broad prohibition on State or local barriers to competition are narrow and are set forth in other subsections of Section 253. The exception granted regarding public rights-of-way is narrow and is set forth in Section 253(c) which reads:

> Nothing in this section effects the authority of a state or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of the public rights-of-way on a nondiscriminatory basis . . . .

This narrow exception cannot be stretched to include the MN/DOT-DOA plan, which is admittedly intended to trade the commercial advantage of exclusive use for a better price for the State. Any management of the right-of-way or any compensation to be received must occur on a "competitively neutral and nondiscriminatory basis."

The fact that there was an opportunity to bid for the MN/DOT contract does not satisfy the competitive neutrality and nondiscriminatory requirements for at least two reasons. First, the grant of exclusive use of the freeway rights-of-way will severely impede competition in providing telecommunications services to communities along the freeway routes by foreclosing a primary route into and out of these communities. The grant of exclusive use of the freeway rights-of-way will also impede competition in other parts of Minnesota and in other states, given that the freeways provide some of the most direct and efficient routes within Minnesota and between other states and that acquisition of rights-of-way for facilities is among the most difficult aspects of becoming a competitive provider.

Second, the RFP required bidders to bid for the entire State. This feature of the RFP excluded many potential providers of other interstate and intrastate telecommunications services that were too small to bid on the entire state as the RFP required. While the State does not necessarily have to purchase telecommunications services from multiple providers, such

MOSS & BARNETT
A Professional Association



providers cannot be excluded from use of the rights-of-way to provide other telecommunications services if they would otherwise satisfy all safety and similar criteria.

It is also clear that the narrow exception for management of the rights-of-way excludes any inference of any broader exception. It is a well established principal of statutory construction that, when a statute lists a limited exception to a broad prohibition, other exceptions are not to be implied. Tang v. Reno, 77 F.3d 1194 (9th Cir. 1996); Detweiler v. Pena, 38 F.3d 591 (D.C. Cir. 1994).

The Act does not prevent the State of Minnesota from making the state's highway right-of-way available for construction of a "telecommunications infrastructure." However, such activities must be carried out in a competitively neutral and nondiscriminatory manner, without impairing competition.

## CONCLUSION

Based on the foregoing, it is clear that the RFP, which reflects an intent to trade an exclusive right to use the freeway rights-of-way for a favorable price to the State, and any contract granting exclusive rights to use the freeway rights-of-way, both violate of Section 253 of the Act.

Please feel free to call me at 347-0275 if you wish to discuss this issue further.

Very truly yours,

Richard J. Johnson

RJJ/jms
cc: Mr. Jerry Knickerbocker
Enclosures
54684/15HX011.DOC

HUBERT H. HUMPHREY III
ATTORNEY GENERAL

# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

EXHIBIT
2

BUSINESS REGULATION SECTION
SUITE 1200
445 MINNESOTA STREET
ST. PAUL, MN 55101-2130
TELEPHONE: (612) 296-9412

September 25, 1997

Richard J. Johnson, Esq.
Moss & Barnett, a Professional Association
4800 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402-4129

Re: Agreement to Develop and Operate Communications Facilities

Dear Rick:

On August 22, 1996, you sent Mr. Mueting from our office, a letter indicating the objections of the Minnesota Telephone Association ("MTA") to an agreement to be negotiated between the Minnesota Department of Transportation ("MnDOT") and ICS/Stone & Webster ("Developer"), following selection of the latter as the developer of a fiber optic network in accordance with a February 21, 1996 MnDOT Request for Proposals ("RFP"). Since that time you and I have discussed this matter on several occasions.

In your letter, MTA based its objections on Section 253 of the Telecommunications Act of 1996 (the "Telecom Act"). At the time you made the objections, of course, MnDOT had not even begun negotiations with the Developer. As you know, negotiations have been under way for some time now. We are confident that your review of these provisions and this letter will demonstrate that your stated concerns about possible violation of Section 253(a) of the Telecom Act have been avoided.

More specifically, you stated that a grant of exclusive access to rights-of-way would prohibit or have the effect of prohibiting the ability of unidentified entities to provide interstate or intrastate telecommunications service, arguing that such access will violate Section 253(a) because:

(a) It will impede competition by foreclosing a primary route into and out of communities located along the freeways;

(b) The agreement will impede competition, based on your contention that freeways provide some of the most direct and efficient routes within

Minnesota and that acquisition of rights-of-way is among the most difficult aspects of becoming a competitive provider;

(c) The RFP required bidders to bid for the entire state, which, in your view, excluded many potential providers because their size precluded submitting a bid for the entire state.

The focus of your stated concerns is the perceived impact that the agreement will have on retailers, or ***providers of telecommunications services.*** What you did not know at the time of your letter, and could not have known, is that the Developer will provide only wholesale fiber optic transport capacity to telecommunications service providers. In other words, the Developer will operate the network as a carrier's carrier. In addition, consistent with the requirements of Section 253(c) of the Telecom Act, the agreement will require the Developer to provide capacity to service providers based on uniform and non-discriminatory rates and charges. The agreement with the Developer, therefore, will not foreclose to service providers a primary route into and out of communities located along the freeways, but will ***create*** an additional fiber route to supplement the already existing fiber networks throughout Minnesota, thereby ***promoting*** competition among service providers. In addition, there will be a five-year review process to assure that adequate fiber capacity exists in the State.

With respect to your specific allegations, there is no change to the current development of competitive alternatives in the interexchange markets. No restrictions on previously available rights-of-way or previously existing fiber networks have been imposed. The market for interexchange wholesale transport is basically unregulated and the FCC and the MPUC have both recognized that the interexchange market is competitive. Thus, any state law or requirement which simply acts to add another capacity provider to an already competitive interexchange market, cannot be considered to be impeding competition, as suggested in your letter.

You also assert that the RFP required bidders to bid for the entire state and that such a request impaired entry by small companies. First, it is surprising that the MTA, which represents many small outstate exchanges, would be concerned about an RFP which favored providers that did not limit their offerings to the Metro area. Second, as you are aware, the State intends to utilize the network to promote Intelligent Transportation Systems and to serve MnDOT and MNET needs. This requires infrastructure deployment in these areas and increased transport capacity alternatives should benefit customers in these areas served by many of your member companies. Most importantly, no provider, large or small, is prohibited or effectively prohibited from offering telecommunications services in the State of Minnesota as a result of this transaction.

Implementation of the agreement will result in significant gains to the public. Specifically, the agreement will:

(a) Reduce telecommunications costs to State government by exchanging rights-of-way access for transmission capacity;

(b) Utilize the transmission capacity obtained through the agreement for the development of various intelligent transportation services ("ITS") applications, which will increase the efficient use of State freeways by the traveling public, and for the other general telecommunications needs of MnDOT and other State agencies;

(c) Increase the availability of telecommunications infrastructure in the State by adding freeway rights-of-way for routing for an additional fiber optic telecommunications network; and

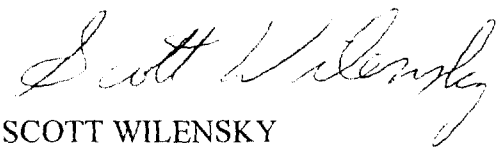
(d) Create an opportunity to extend a fiber optic network to rural areas of the State which otherwise would have little or no prospect of being serviced by an additional fiber optic cable provider.

Pursuant to your request, we have informally inquired of FCC staff whether or not they believe that the proposed transaction is a violation of Section 253(a) of the 1996 Telecom Act. Staff indicated that they did not view such action as a per se violation of Section 253(a). They informed us that they would probably look at the issue on a fact-specific basis and evaluate the practical effect on competition, including: the terms by which the provider would make such capacity available; the market share of the provider; and whether or not there are currently constraints or alternative choices in the market. The only effect of the agreement with Developer will be to strengthen competitive market forces for wholesale fiber optic transport capacity.

Given the above, we are confident that the agreement will avoid the concerns you expressed in your August 26, 1996 letter. We are moving forward with our negotiations and assume, on the basis of this letter, that you no longer object. If my assumption is incorrect, I

would appreciate your setting forth in writing if you continue to have objections and why this additional information has not resolved your concerns. I would appreciate a response at your earliest opportunity.

Sincerely,



SCOTT WILENSKY
Assistant Attorney General
Manager, Residential and Small
Business Utilities Division
(612) 297-4609

cc: Adeel Lari
Bill Schenllman
Don Mueting
Henry Helgen

EXHIBIT
3

LAW OFFICES
MOSS & BARNETT
A PROFESSIONAL ASSOCIATION
4800 NORWEST CENTER
90 SOUTH SEVENTH STREET
MINNEAPOLIS, MINNESOTA 55402-4129
TELEPHONE (612) 347-0300
FACSIMILE (612) 339-6686

WRITER'S DIRECT DIAL NUMBER
347-0275

WRITER'S E-MAIL ADDRESS
JohnsonR@moss-barnett.com

HERMAN J. RATELLE
PAUL VAN VALKENBURG
MICHAEL L. FLANAGAN
THOMAS A. KELLER III
W. SCOTT HERZOG
JAMES E. O'BRIEN
PAUL G. NEIMANN
EDWARD L. WINER
WILLIAM N. KOSTER
WILLIAM A. HAUG
CHARLES A. PARSONS, JR.
RICHARD J. JOHNSON
ROBERT J. LUKES
JAMES A. RUBENSTEIN
THOMAS R. SHERAN
† MICHAEL HIRSCH

EDWARD J. BLOMME
ANN K. NEWHALL
MICHAEL J. AHERN
JEFFREY L. WATSON
THOMAS J. SHROYER
DAVID P. JENDRZEJEK
CURTIS D. SMITH
DAVE P. SENGER
ROBERT A. BRUNIG
MITCHELL H. COX
MICHAEL J. BRADLEY
PETER A. KOLLER
RICHARD J. KELBER
KEVIN M. BUSCH
SUSAN C. RHODE
THOMAS M. HUGHES

NICK HAY
THOMAS A. JUDD
DRANNE M. GRECO
CASS S. WEIL
JANNA R. SEVERANCE
M. CECILIA RAY
JOSEPH R. KLEIN
NANCY M. KISKIS
BARRY LAZARUS
RONALD A. EISENBERG
J. MICHAEL COLLOTON
ROBERT B. FIRING
TIMOTHY E. WURSTENHAGEN
PAUL B. ZISLA
VINCENT J. FAHNLANDER
BRIAN T. GROGAN

MARK E. UTZ
CORY LARSEN BETTENGA
JAN M. WAGNER
MICHELLE R. LODYGA
MATHEW M. MEYER

RETIRED
FREMONT C. FLETCHER
VERNE W. MOSS
JAMES H. HENNESSY
STANLEY R. STASEL
HOWARD S. COX
PATRICK F. FLAHERTY
WAYNE A. HERGOTT

November 26, 1997

NOV 26 1997

HAND DELIVERED

Scott Wilensky, Esq.
Assistant Attorney General
Office of the Attorney General
445 Minnesota Street
St. Paul, MN 55101-2130

Re: Proposal of Minnesota Department of Transportation and Department of Administration to Enter Into An Agreement to Grant Exclusive Access to State Freeway Right of Way
Our File No. 16571.16

Dear Mr. Wilensky:

This letter is sent on behalf of the Minnesota Telephone Association ("MTA") in further response to your letter of September 25, 1997. Your letter discusses features of an agreement now nearing final negotiation between the Minnesota Department of Transportation ("Mn/DOT") and ICS/Stone & Webster ("ICS/S&W"). Your letter confirms that Mn/DOT intends to grant to ICS/S&W the exclusive right to use of "freeway" rights-of-way within Minnesota for "commercial communication infrastructure purposes," subject to certain pricing and other safeguards to be enforced by the State on behalf of third parties (the "Exclusive Use Arrangement").

On October 8, 1997, I sent you a brief letter to prevent Mn/DOT from proceeding on the incorrect assumption that MTA's concerns had been resolved by your letter. For the reasons set forth below, it is clear that the Exclusive Use Arrangement would violate Subsection 253(a) of the Telecommunications Act of 1996 (the "Act"). Further, the Exclusive Use Arrangement is not permitted by either Subsections 253(b) or (c). Accordingly, it would be subject to preemption by the Federal Communications Commission ("FCC") under Subsection 253(d).

I apologize for the length and formal tone of this letter, but I wish to avoid any misunderstanding or possibility that Mn/DOT would proceed without awareness of the weight of authority against the Exclusive Use Arrangement.

## I. SUMMARY

A series of cases decided by the FCC confirm that the Exclusive Use Arrangement violates the terms of Subsection 253(a) of the Act, is not permitted by either Subsections 253(b) or (c), and would be preempted by the FCC under Subsection 253(d).[1] The Exclusive Use Arrangement:

- Grants to one telecommunications service provider (ICS/S&W) a 30 (or more) year exclusive right to use the freeway rights of way;
- Severely impedes the ability of other service providers to use their own facilities in the most efficient manner;
- Provides to ISC/S&W significant cost advantages in competing to provide some very significant telecommunications services; and
- Is inherently incapable of satisfying the Act's requirement of competitive neutrality.

Further, even if the Exclusive Use Arrangement enhanced competition for some telecommunications services, exclusive use for one service provider and the resulting impediments to other providers to use of their own facilities and to compete for other telecommunications services (e.g. "carrier's carrier" services) are not permitted under the Act.

## II. PRIMARY TERMS OF EXCLUSIVE USE ARRANGEMENT.

Although it appears that the final negotiations and contract documentation have not yet occurred, both your letter and the Mn/DOT Request for Proposals dated February 20, 1996 (the "RFP"), describe the primary terms of the Exclusive Use Arrangement. It seems clear that the Exclusive Use Arrangement will grant to ICS/S&W an exclusive right to use of the

---

[1] In the Matter of Classic Telephone, Inc., CCB Pol 96-10, MEMORANDUM OPINION AND ORDER, FCC 96-397, Released: October 1, 1996 ("Classic"); In the Matter of New England Public Communications Council, CCB Pol 96-11, MEMORANDUM OPINION AND ORDER, Released: December 10, 1996, MEMORANDUM OPINION AND ORDER (on Petition for Reconsideration), Released: April 18, 1997 ("New England"); In the Matter of California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, CCB Pol 96-26, MEMORANDUM OPINION AND ORDER, Released: July 17, 1997 ("Huntington Park"); In the Matter of TCI CABLEVISION OF OAKLAND COUNTY, INC., C SR-4790, MEMORANDUM OPINION AM ORDER, FCC 97-331, Released: September 19, 1997 ("TCI"); In the Matter of Silver Star Telephone Company, CCB Pol 97-1, MEMORANDUM OPINION AND ORDER, Released: September 24, 1997 ("Silver Star"); and In the Matter of The Public Utility Commission of Texas, et al, CCB Pol 96-13 et al, MEMORANDUM OPINION AND ORDER, FCC 97-346, Released: October 1, 1997 ("Texas").

approximately 1000 miles of "freeway" right-of-way (primarily Interstate) to install telecommunications infrastructure for 30 or more years.[2] In return for granting the right of exclusive use, the State will receive capacity.[3]

Your letter also suggests that the contract with Mn/DOT will govern ICS/S&W's commercial relationships with third parties, including members of the MTA, that the contract will require ICS/S&W to charge "non-discriminatory rates" for services provided to third parties, and that there will be periodic reviews of those rates by Mn/DOT or some other State government agency. It further appears that some State agency will periodically review the capacity of the ICS/S&W fiber network to insure that it remains adequate for all needs.

## III. THE ESTABLISHED CRITERIA FOR REVIEW UNDER SECTION 253 WILL LEAD TO PREEMPTION BY THE FCC.

The FCC has established the process for review under Section 253. First, the FCC determines whether there is a violation of Subsection 253(a). If so, then a review is conducted under Subsections 253(b) and/or (c) to determine whether the violation is permitted under those Subsections.[4] If not, the FCC is obligated to preempt under Subsection 253 (d).[5]

---

[2] The RFP states:

> "Mn/DOT is willing to consider an agreement term for up to 30 years which could be renewed for an additional 20 years by mutual agreement."

[3] As the RFP stated:

> "Mn/DOT wishes to barter exclusive rights to freeway right of way in exchange for capacity to satisfy immediate and future state needs."

[4] "Under this approach, we first determine whether the challenged law, regulation or legal requirement violates the terms of section 253(a) standing alone. If we find that it violates section 253(a) considered in isolation, we then determine whether the requirement nevertheless is permissible under section 253(b). If a law, regulation, or legal requirement otherwise impermissible under subsection (a) does not satisfy the requirements of subsection (b), we must preempt the enforcement of the requirement in accordance with section 253(d). If, however, the challenged law, regulation or requirement satisfies subsection (b), we may not preempt it under section 253, even if it otherwise would violate subsection (a) considered in isolation. This is consistent with the approach taken in prior Commission orders addressing section 253." Texas ¶ 42.

[5] Section 253(d) reads in part:

> (d) If . . . the Commission determines that the State or local government has permitted or imposed any statute, regulation, or legal requirement that violates Section (a) or (b), the Commission shall preempt the enforcement of such statutes, regulations, or legal requirements to the extent necessary to correct such violation or inconsistency.

"In sum, section 253 expressly empowers -- indeed, obligates -- the Commission to remove any state or local legal mandate that "prohibit[s] or has the effect of prohibiting" a firm from providing any interstate or intrastate telecommunications service. We believe that this provision commands us to sweep away not only those state or local requirements that explicitly and directly bar an entity from providing any telecommunications service, but also

For the reasons set forth below, it is clear that Subsection 253(a) of the Act prohibits any Exclusive Use Arrangement that limits use of the freeway right of way to a single competitor, that such an arrangement is not within the scope of either Subsections 253(b) or (c) and that the FCC is required to preempt such arrangements by Subsection 253(d).

### A. The Grant of Exclusive Use Of The Freeway Right Of Way by Mn/DOT Would Violate Section 253(a).

Section 253(a) establishes the basic requirements applicable to State and local authorities, reading as follows:

> (a) No state or local statute or regulation, or other state or local legal requirement may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

As the following discussion will demonstrate, the Exclusive Use Arrangement is a "legal requirement" that has the "effect of prohibiting the ability" of numerous "entit[ies]" to provide several "interstate [and] intrastate telecommunications service[s]."

#### 1. A Contract Can Be A "Legal Requirement" Within The Scope Of Section 253(a).

A contract by a State or local government may be a "legal requirement" within the meaning of Section 253(a). Accordingly, if such a contract prohibits, or has the effect of prohibiting, any entity's ability to provide any telecommunications service, that contract will violate Section 253(a).

In a case involving installation of pay phones within a municipal right-of-way, the FCC rejected a competitor's challenge to the municipality's pay phone agreement because, ". . . no party has offered evidence that the City has insisted upon contract terms that would effectively prohibit pay phone service providers other than Pacific Bell. . ." Huntington Beach ¶ 35. However, the Commission went on to explain:

> "[T]he City's contracting conduct would implicate Section 253(a) . . . if it materially inhibited or limited the ability of any competitor or potential

---

those state or local requirements that have the practical effect of prohibiting an entity from providing service." (Emphasis added.) Texas ¶ 22.

> competitor to compete in a fair and balanced legal and regulatory environment in the market for pay phone services in the central business district. In other words, the City's contracting conduct would have to actually prohibit or effectively prohibit the ability of a pay phone service provider . . ."

(Emphasis added.) Id. 38. Huntington Beach establishes that a contract can be a "legal requirement" within Section 253(a).

### 2. Mn/DOT's Proposed Exclusive Use Arrangement Has The Effect Of Prohibiting The Ability Of Other Telecommunication Service Providers To Provide Competitive Service.

Under the Exclusive Use Arrangement, Mn/DOT will have selected a single provider (ICS/S&W) and will grant to ICS/S&W the exclusive right to use the freeway right of way to install telecommunications facilities. The exclusive right to use the right of way "has the effect of prohibiting the ability of [many] entities to provide [many] interstate [and] intrastate telecommunications services", within the meaning of Section 253(a).

Your letter asserts that the Exclusive Use Arrangement will not "prohibit" competitive providers from reselling the "wholesale" capacity that ICS/S&W will provide and that competitors will be able to install their own facilities on other routes. It is true that competition by resale would be possible and that competitors would be able to install their own facilities in other routes. But the bar of Section 253(a) is not limited to only complete and total prohibitions on the ability to provide competing telecommunications services. Rather, as the FCC has stated, Section 253(a) also bars legal requirements that limit the available means of competition and/or impose added costs on some entities.

The Exclusive Use Arrangement will either: 1) substantially increase the investments required to provide service to communities along the freeway corridors (by requiring indirect routing of facilities); or 2) coerce entities who wish to avoid such costs to use the ICS/S&W facilities. Such a dilemma for competitors is barred by Section 253(a).

#### a. Section 253(a) bars the Exclusive use Arrangement's restriction on the ability of other service providers to use their own facilities.

Your letter asserts that competition is already prevalent in the market for "wholesale fiber-optic capacity", and that ". . . any state law which simply acts to add another capacity provider . . . cannot be considered to be impeding competition." But, the Exclusive Use Arrangement does not simply "add" capacity at the wholesale level. Rather, it would add one